

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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Re: Nicholas Richard Arend,

Bky Case No. 03-42833

Debtor.

Chapter 7

Citibank (South Dakota), N.A.,

Plaintiff,

v.

Adv Case No. 03-4194

Nicholas Richard Arend,

Defendant.

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NOTICE OF MOTION AND MOTION FOR DEFAULT JUDGMENT AS SANCTION FOR  
DEFENDANT'S FAILURE TO ATTEND DEPOSITION AND FOR ALTERNATIVE RELIEF

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TO: Nicholas Richard Arend, Pro Se, 14109 Excelsior Blvd, Minnetonka, MN 55345.

1. Plaintiff, by its undersigned attorneys, moves the Court for Order granting default judgment in its favor as sanctions for Defendant's failure to attend his own deposition.

2. In the alternative, Plaintiff requests an order compelling the Defendant to reimburse Plaintiff for its costs and fees caused by Defendant's failure to attend his own deposition, and further ordering Defendant to appear at his deposition to be rescheduled by Plaintiff's attorney, extending the deadlines in the Court's prior Scheduling Order, and further providing for the entry of default judgment if the Defendant fails to attend the rescheduled deposition.

2. The Court will hold a hearing on this motion on February 18, 2004, at 1:00 PM, U.S. Bankruptcy Court, Courtroom 7 West, United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415.

3. Any response to this motion must be filed with the Court and delivered to all interested parties not later than February 13, 2004, which is three days (excluding Saturdays, Sundays and holidays) before the time set for hearing; or filed with the Court and served by mail not later than February 9, 2004, which is seven days (excluding Saturdays, Sundays and holidays) before the time set for hearing. **UNLESS A RESPONSE IS TIMELY FILED, THE COURT IN ITS DISCRETION MAY GRANT THE REQUESTED RELIEF WITHOUT A HEARING.**

4. This motion is filed under Bankruptcy Rule 7037, incorporating Federal Rule of Civil Procedure 37(b)(2)(C).

5. This motion is supported by the accompanying Memorandum and Affidavit of Peter B. Stein, and the accompanying Affidavit of Stephanie Hensley.

WHEREFORE, movant moves the Court for an Order as set forth above.

STEIN & MOORE, P.A.

Date: January 7, 2004

By /e/ Peter B. Stein  
Peter B. Stein #104917  
Attorneys for Plaintiff  
The First National Bank Building  
332 Minnesota Street, Suite W-1650  
St. Paul, MN 55101  
(651) 224-9683

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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Bky Case No. 03-42833

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Chapter 7

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Adv Case No. 03-4194

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Defendant.

---

AFFIDAVIT OF PETER B. STEIN IN SUPPORT OF MOTION

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STATE OF MINNESOTA    )  
                                  )ss.  
COUNTY OF RAMSEY    )

Peter B. Stein, being on oath duly sworn, deposes and says:

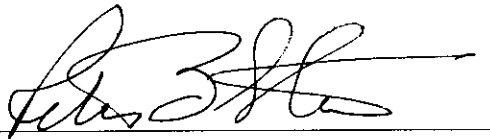
1. I am one of the attorneys for Plaintiff above named.
2. This is Plaintiff's **second** Motion regarding Defendant's failure to respond to discovery.
3. Plaintiff's first Motion, which was a Motion to Compel, related to Defendant's failure to respond to written discovery, resulted in this Court's Order of December 2, 2003, pursuant to the terms of which the Defendant was required to serve responses to written discovery no later than 15 days after the date of the Order. The Court also issued an Amended Scheduling Order, which set the close of discovery at January 15, 2004, and set a trial for March, 2004.
4. On December 12, 2003, Defendant faxed his responses to the office of the undersigned. A copy of those responses is attached as Exhibit A. The fax was followed by mailed service.
5. Although the responses were unresponsive in various respects, your Affiant went forward with the discovery process to bring this matter to a conclusion. Specifically, I caused a Notice of Deposition to be served by mail on the Defendant. Attached hereto as Exhibit B is a true

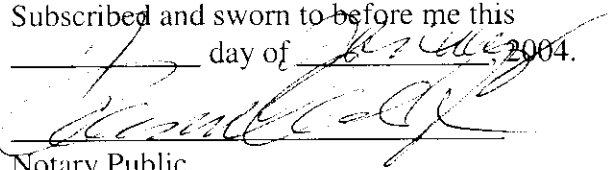
and correct copy of Plaintiff's Notice of Taking Deposition, and attached as Exhibit C is a copy of the applicable Statement and Declaration of Proof of Service. It shows that this notice was served by first class mail on December 26, 2003. The Deposition was scheduled to take place at my offices on the morning of January 7, 2004.

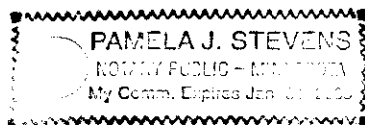
6. The Defendant did not show for his deposition on January 7, 2004, at my offices. I waited one half hour for him to appear, and then made a record with the Court Reporter of the Defendant's nonappearance. I have received no other communications from the Defendant.

7. Plaintiff incurred approximately \$90 of court reporter fees in connection with Defendant's failure to appear at his own deposition. My time, including preparation for the Deposition (including exhibits), as well as the bringing of this motion, is estimated to total approximately three and one half hours. My hourly rate range from \$200 to \$240 per hour.

FURTHER YOUR AFFIANT SAYETH NOT.

  
Peter B. Stein

Subscribed and sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, 2004.  
  
Notary Public



## facsimile transmittal

To: Peter B. Stein

Fax: 651-223-5212

From: Nick Arend

Date: 12/12/03

Re: ADV. 03-4194

Pages: 4

CC:

☒ Urgent☐ For Review☐ Please Comment☐ Please Reply☐ Please Recycle

Notes

EXHIBIT

A

tabbies

CONFIDENTIAL

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

Re: Nicholas Richard Arend

BKY CASE NO. 03-42833

DEBTOR

CHAPTER 7

CITIBANK (South Dakota), N.A.,

**DEFENDANTS ANSWER TO  
PLAINTIFF'S FIRST SET OF  
CONTINUING REQUESTS FOR  
ADMISSIONS,  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION  
OF DOCUMENTS**

Plaintiff,

v.

Adv Case No. 03-4194

Nicholas Richard Arend

Defendant  
In Pro Se

Comes now Defendant, Nicholas Richard Arend, In Pro Se, in answer to Plaintiff's Complaint to Determine Dischargeability of Debt.

1. Defendant denies requests for admission 1, do not have sufficient information available to make an unqualified admission.
2. Defendant denies requests for admission 2, do not have sufficient information available to make an unqualified admission.
3. Defendant denies requests for admission 3, do not have sufficient information available to make an unqualified admission.
4. Defendant denies requests for admission 4, do not have sufficient information available to make an unqualified admission.
5. Defendant denies requests for admission 5, do not have sufficient information available to make an unqualified admission.
6. Defendant denies requests for admission 6, do not have sufficient information available to make an unqualified admission.
7. Defendant denies requests for admission 7, do not have sufficient information available to make an unqualified admission.
8. Defendant denies requests for admission 8, do not have sufficient information available to make an unqualified admission.
9. Defendant denies requests for admission 9, do not have sufficient information available to make an unqualified admission.

10. Defendant denies requests for admission 10, do not have sufficient information available to make an unqualified admission.
11. Defendant denies requests for admission 11, do not have sufficient information available to make an unqualified admission.
12. Defendant denies requests for admission 12, do not have sufficient information available to make an unqualified admission.

### RESPONSE TO INTERROGATORIES

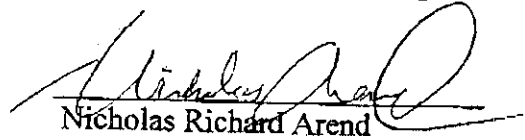
1. The Requests for Admissions are all denied as they are composed of vague wording and generalized statements and as such I cannot make an unqualified admission without giving the impression to the plaintiff that I concur with the statements that are made. I do not have copies of plaintiffs' account statements and therefore cannot verify that the figures represented are true and correct.
2. Age - 30 years old, present occupation - probate representative, education - Bachelor of Arts, Employment history - 6 years as collection representative, 2 years as a manager
3. A. Estimated gross income prior to being laid off in September was \$6500 per month, of which \$4500 came from my job, \$2000 came from renters (when they paid)  
B. Unemployment, a frivolous lawsuit  
C. I do not have the requested documentation but you can obtain the information from Tommy Lyons/Consumer justice center.  
D. I expected to have a management job in collections but it never materialized.
4. Prior to losing my employment I used my earnings to pay all my debts, once unemployed I had no earnings. I have no monthly statements in my possession to refer to.
5. I cannot recall each credit transaction, including each merchant transaction and cash advance though some or all of the credit transaction may have paid for my mortgage payment, utilities and food needs.
6. I was gainfully employed and assumed that my unemployment would only be a temporary inconvenience. I expected to pay all my indebtedness to Plaintiff with my earnings.
7. NO
8. NO
9. After being unemployed and not having any earnings.
- 10a-c. I was told when I spoke with an attorney that my dealings and conversations were considered confidential under an attorney-client privilege and therefore will not be disclosed.
11. After being unemployed and not having any earnings.
12. NO documents to reference
13. My personal finances are my personal business, no one has knowledge of my personal business affairs.
14. No witnesses will be called. It is plaintiff's burden of proof to prove their allegations which I have denied.
15. To the best of my knowledge none known.

### REQUEST FOR PRODUCTION OF DOCUMENTS

1. No documents have been identified in the interrogatories and there are no documents related to plaintiff's interrogatories that are in my control or the control of anyone else.
2. I am not in possession of any monthly account statements with any revolving credit facilities for any years. I filed bankruptcy and these debts are discharged and uncollectible.

Dated:

12/12/03



Nicholas Richard Arend

In Pro Se

14109 Excelsior Blvd

Minnetonka, MN 55345

952-908-1128



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

Re: Nicholas Richard Arend,

Bky Case No. 03-42833

Debtor.

Chapter 7

Citibank (South Dakota), N.A.,

Plaintiff,

v.

Adv Case No. 03-4194

Nicholas Richard Arend,

Defendant.

NOTICE OF TAKING DEPOSITION DUCES TECUM

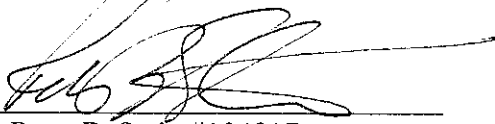
TO: Nicholas Richard Arend, Pro Se, 14109 Excelsior Blvd, Minnetonka, MN 55345.

**PLEASE TAKE NOTICE** that the deposition of Nicholas Richard Arend ("deponent") by oral examination will be taken before a qualified notary public on Wednesday, January 7, 2004 at 10:00 a.m., and thereafter by adjournment until the same shall be completed, at the offices of Stein & Moore, P.A., The First National Bank Building, 332 Minnesota Street, Suite W-1650, St. Paul, MN 55101, and Deponent shall bring with him the documents in the list attached hereto as Exhibit A and made a part hereof.

Date: December 26, 2003

STEIN & MOORE, P.A.

By

  
Peter B. Stein #104917

Attorneys for Plaintiff

The First National Bank Building  
332 Minnesota Street, Suite W-1650  
St. Paul, MN 55101  
(651) 224-9683



EXHIBIT A TO  
REQUESTS FOR PRODUCTION OF DOCUMENTS  
AND TO NOTICE OF TAKING DEPOSITION DUCES TECUM

THE FOLLOWING REQUESTS CONCERN THE PERSONAL ASSETS AND LIABILITIES OF THE DEBTOR-DEFENDANT FOR THE YEARS 2001 TO DATE, UNLESS OTHERWISE INDICATED.

1. All records, including monthly statements, checkbook records, savings book records, and canceled checks, of all bank and other financial institution accounts as to which Debtor-Defendant has or had a right of withdrawal in any capacity whatsoever, including as a corporate officer and as a fiduciary. This request includes records of all certificates of deposit, all personal checking accounts, all personal savings accounts, and any other bank or financial institution accounts in which Debtor-Defendant has or had an interest or in which Debtor-Defendant has or had a right of withdrawal.
2. Copies of all personal state and federal income tax returns and accompanying schedules.
3. All pay stubs and other records of payment received by the debtor as salary, wages or other compensation.
4. All documentation pertaining to any personal, family or household purchases by Debtor-Defendant of any property of any nature whatsoever involving \$1,000.00 or more.
5. All personal financial statements given by Debtor-Defendant to any bank or other financial institution for the purpose of obtaining a loan or for any other purpose.
6. All real estate documents relating to any real property owned by Debtor-Defendant, including all deeds, earnest money contracts, purchase agreements, contracts for deed, or duplicate certificates of title, and the like.
7. All employment agreements, partnership agreements, limited partnership agreements, joint venture agreements, stock redemption agreements, buy/sell agreements, and any other business agreements to which Debtor-Defendant is or was a party.
8. Monthly statements of account as to each and every revolving credit facility as to which Debtor-Defendant has had a right of use or withdraw.
9. The license plate number, vehicle identification number, title and registration papers for all motor vehicles in which the Debtor-Defendant has had an interest.
10. All documents or papers that would help describe, identify, explain or clarify the Debtor-Defendant's assets and liabilities.

THE FOLLOWING REQUESTS CONCERN ALL PARTNERSHIPS, CORPORATIONS, SOLE PROPRIETORSHIPS OR OTHER BUSINESS ORGANIZATIONS IN WHICH THE DEBTOR-DEFENDANT IS AN OWNER OR HAS HAD AN INTEREST IN OF ANY KIND OR HAS BEEN INVOLVED IN. THE DOCUMENTS REQUESTED PERTAIN TO THE YEARS 2001 TO DATE, UNLESS OTHERWISE INDICATED.

11. All documents evidencing or clarifying the nature of Debtor-Defendant's interests, including a security interest in the assets, of each such sole proprietorship, partnership, corporation, or business organization.
12. With respect to each sole proprietorship, partnership, corporation, or other business organization in which the Debtor-Defendant has an interest, please provide the following documents:
  - a. Federal and state income tax returns, and accompanying schedules.
  - b. Financial statements, including balance sheets and profit and loss statements given to any bank or other financial institution for the purpose of obtaining a loan or for any other purpose.
  - c. All records pertaining to any safe deposit boxes owned or rented, including the location and number of said deposit box or boxes, by any partnership, corporation, or other business organization.
  - d. All records, including monthly statements, checkbook records, saving book records, and canceled checks, of all bank and other financial institution accounts as to which such proprietorship or business entity has a right of withdrawal or other interest.
  - e. All documents evidencing an interest, including leasehold interests, in any real estate, wherever located. This includes copies of leases.
  - f. Every corporate minute book and balance sheet for the last two years.
  - g. The license plate number, vehicle identification number, and title and registration papers for any automobile, tractor, truck, motorcycle or other motor vehicle owned by each such sole proprietorship, partnership, corporation or business within the last two (2) years.
  - h. Any relevant documents or papers regarding the sale, lease, or other transfer by each such sole proprietorship, partnership, corporation or business of any of its assets during the last two (2) years.

- i. Any relevant documents or papers that would help describe, identify, explain, or clarify each such sole proprietorship, partnership, corporation or business' assets and liabilities.
- j. All pertinent data concerning accounts receivable owing to each such sole proprietorship, partnership, corporation or business, including names and addresses of account debtors and amounts owed.
- k. Monthly statements of account for each and every revolving credit facility as to which each such sole proprietorship, partnership, corporation or business has or had a right of withdrawal or other interest.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re: Nicholas Richard Arend

STATEMENT AND DECLARATION  
OF PROOF OF SERVICE

BKY No. 03-32655/ADV No. 03-3208

Pamela Stevens employed at Stein, Moore & Fay, P.A., attorneys licensed to practice law in this Court, with an office address of the First National Bank Building, 332 Minnesota Street, Suite W-1650, St. Paul, Minnesota, 55101, declares that on December 26, 2003, I served:

Notice of Deposition Duces Tecum

upon each of the entities named below by mailing to each of them, by **first class mail**, a copy thereof by enclosing same in an envelope, postage prepaid and depositing same in a mailbox in St. Paul, Minnesota, addressed to each of them as follows:

Nicholas Richard Arend  
14109 Excelsior Boulevard  
Minnetonka, MN 55345

And I declare, under penalty of perjury, that the foregoing is true and correct.

By: [Signature]  
Pamela Stevens

Subscribed and sworn to before me  
this 26<sup>th</sup> day of December, 2003.

[Signature]

NOTARY PUBLIC - MINNESOTA  
My Comm. Expires Jan. 27, 2005





4. Thereafter, from December 17, 2002 through January 20, 2003, the Defendant obtained new credit under his credit card as follows: cash advances arising out of two "balance transfer" checks that the Defendant made payable to himself, totaling \$8,500.00 (see attached Exhibits A & B) and one cash advance of \$600.00 (see attached Exhibit C), the aggregate total of all such credit advances being \$9,100.00.

5. The Defendant has made no payments whatsoever in reduction of the above-described debt, except as follows: a single payment of \$300 posted on December 17, 2003 (See Exhibit C). On information and belief, this single payment was made to avoid the appearance of impropriety and to keep the credit facility open.

6. Based upon the Statement of Income and Expenses and Statement of Financial Affairs filed in this case, it appears that at no time since 2001 did the Defendant have the necessary disposable income to maintain the minimum required monthly payment on any of his credit card debt other than by borrowing from others. As of the time of the bankruptcy filing, the Defendant was carrying some \$92,000.00 of unsecured debt against a fixed unemployment income and funds he receives from renters.

7. Of the amounts owing to Plaintiff under the Credit Card Agreement, it appears that no less than \$8,800.00 (the "Disputed Balance"), representing the foregoing new credit obtained less the above-referenced single payment, was incurred by the Defendant under circumstances reflecting an absence of intent to repay.

8. On information and belief, it appears that Defendant incurred the debt to Plaintiff resulting in the Disputed Balance under "false pretenses" and/or by engaging in "actual fraud", all within the contemplation of 11 U.S.C. Section 523(a)(2)(A). In particular, Defendant appears to have incurred the debt in question under circumstances when Defendant had no intent (nor the ability) to repay Plaintiff. By using the credit card obtained under the Credit Card Agreement to obtain from Plaintiff the extensions of credit giving rise to the Disputed Balance, Defendant in

effect impliedly represented to Plaintiff that Defendant had the intent to repay the Disputed Balance. In so doing, Defendant on information and belief intentionally and knowingly induced Plaintiff to extend to Defendant credit which Defendant did not intend to repay. Plaintiff did not know of Defendant's actual lack of intent to repay the Disputed Balance (nor of Defendant's inability to do so). Plaintiff, whenever it engages in a credit transaction with any of its accountholders, including the Defendant here, justifiably relies upon its accountholders' implied representation as of the moment of the credit transaction that the accountholder in good faith intends to repay the debt according to its terms. Here, Plaintiff was deceived in extending such credit to the Defendant, and accordingly was damaged to the full extent of the Disputed Balance.

To the extent that the Credit Card Agreement provides that Plaintiff is entitled to recover its costs of collection, including reasonable attorney's fees, Plaintiff is entitled to recover its costs of collection, including reasonable attorneys fees, incurred in this action.

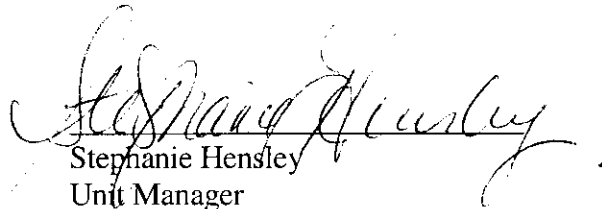
4. There is now due and owing to Plaintiff by Defendant, under and pursuant to the matters stated in the Complaint, the following sums: the sum of \$8800.00 as of April 17, 2003.

5. Plaintiff has incurred costs and disbursements as follows: \$150.00 filing fee.

6. Attached hereto as Exhibit D is a copy of a specimen Cardholder Agreement, pursuant to the terms of which the Defendant has agreed to be liable for Plaintiff's costs of collection, including reasonable attorney's fees.

7. Plaintiff will incur attorney's fees in this matter that are estimated to be no less than \$600.00.

FURTHER YOUR AFFIANT SAYETH NOT.

  
Stephanie Hensley  
Unit Manager



Subscribed and sworn to before me  
this 13 day of November, 2003.

Rita Braun  
Notary Public

Nicholas R. Arend  
14109 Excelsior Blvd.  
Minnetonka, MN 55345

170122790 00 1216081702

Date

\$ 2000.00

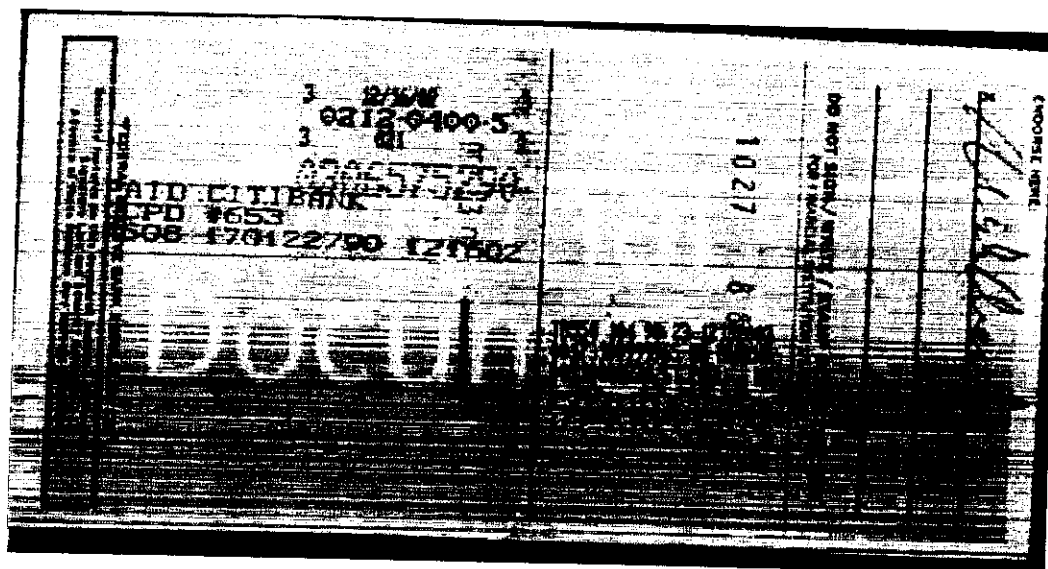
Pay to the Order of Mr. Arend and Mrs. [illegible]

Dollars

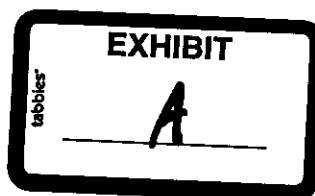
**citi**  
Citibank Federal Savings Bank  
78 Sylvan Ave.  
Englewood Cliffs, NJ 07632-1814

memo

10212726710 0432326209041023 0000200000



Posted : 06/19/2003  
Bank : 0032  
R/T : 002127267  
Account : 1236556809043  
Check : 1045  
Amount : 1400.00  
DIN : 141130074266



SEP. 25, 2003 10:31AM

THIS IS WATERMARKED PAPER - DO NOT ACCEPT WITHOUT NOYING WATERMARK - HOLD TO LIGHT TO VERIFY WATERMARK

CITIBANK  
P.O. BOX 2143  
COLUMBUS, OH 43216-2143Please Direct Any Questions  
To: (800) 950-5114

66-1551/441

10819244

BANK ONE  
DELAWARE, OH 43015

December 30, 2002

Pay SIX THOUSAND FIVE HUNDRED AND 00/100

DOLLARS

\$ 6,500.00

To  
The  
Order  
OfAREND, NICHOLAS R  
14109 EXCELSIOR BLVD  
MINNETONKA, MN 55345-4927-09

REMITTANCE CHECK VOID IF NOT CASHED WITHIN 90 DAYS



AUTHORIZED SIGNATURE

⑈10819244⑈ ⑆044115511⑆ 100001007⑈

⑈0000550000⑈

0241660111  
0440-0050-3  
01072003  
ENT=1154 TRC=1154 PK=0617368 102 98 29 4166200  
00173104999999 05 14700  
10910000224 ST PAUL 104  
5941666272

LN-6 31

2011

85094

DO NOT WRITE STRIP OR SIGN BELOW THIS LINE  
RESERVED FOR FUTURE REMITTANCE USEENDORSE HERE  
NOT ACCEPT IF WATERMARK IS ABSENT  
Date Requested 9/24/2003  
Requested By Carin Delaney

Date Processed	MICR Account #	Check Number	Check Amount	Block / Sequence
1/7/2003	100001007	10819244	\$6,500.00	021660111

EXHIBIT

B

tabbles

02/03/03 \$20658.96 \$430.00

SITE:KC-CL TM:CO-6375 ACID:KCB1083  
06/06/03 22:54:54:

PMT DUE DATE

NEW BALANCE

MIN AMT DUE

NICHOLAS R AREND  
14109 EXCELSIOR BLVD  
MINNETONKA  
55345-4927000

MN

CITI CARDS  
P.O. BOX 6406  
THE LAKES, NV  
88901-6406For Customer Service, call or write  
1-800-950-5114

## Citi® Platinum Select® Card

Account Number  
5424 1801 7769 5829

Payment must be received by 1:00 pm local time on 02/03/2003

To report billing errors, write  
to this address; calling will  
not preserve your rights.BOX 6000  
THE LAKES, NV  
89163-6000

Statement/Closing Date 01/09/2003	Total Credit Line \$21240	Available Credit Line \$581 Amount Over Credit Line \$0.00 +	Cash Advance Limit \$3490 Past Due \$0.00 +	Available Cash Limit \$581 Purch/Adv Minimum Due \$430.00 =	New Balance \$20658.96 Minimum Amount Due \$430.00
--------------------------------------	------------------------------	--	--	---	---

Sale Date	Post Date	Reference Number	Activity Since Last Statement	Amount
	12/27	01587522	<b>Payments, Credits &amp; Adjustments</b>	
			PAYMENT THANK YOU	-300.00
	12/24	88888888	70 0000 0000 REVERSE BT AREND,NICHOLAS R	-6,000.00
			72 0000	
	1/09		<b>Balance Transfer - Charged To Offer 4</b>	
			PURCHASES*FINANCE CHARGE*PERIODIC RATE	50.14
			84 0000	0000000000
12/30	12/30	B3601697	<b>Balance Transfer - Charged To Offer 6</b>	
			BAL XFER AREND,NICHOLAS R	6,500.00
	1/09		61 0000US	0
			PURCHASES*FINANCE CHARGE*PERIODIC RATE	13.53
			84 0000	0000000000
12/13	12/13	B3602723	<b>Balance Transfer - Charged To Offer 7</b>	
			BAL XFER AREND,NICHOLAS R	6,000.00
			61 0000US	0
12/17	12/17	10122790	BAL XFER CHECK # 1023	2,000.00
			61 0000US	0
	1/09		PURCHASES*FINANCE CHARGE*PERIODIC RATE	40.92
			84 0000	0000000000

Get 30 days of optional Citibank Credit Protector  
FREE when you enroll today! Simply initial as  
indicated in the lower left-hand corner of your  
billing statement coupon. Remember to return the  
coupon with your payment.

YOU MAY QUALIFY FOR A SPECIAL LOW BALANCE TRANSFER  
RATE AND OTHER CURRENT ACCOUNT BENEFITS!!  
Log onto [balancetransfer.accountonline.com](http://balancetransfer.accountonline.com) or call  
1-800-950-5114 to find out more.

EXHIBIT

tabbies

C

Account Summary	Previous Balance	(+) Purchases & Advances	(-) Payments & Credits	(+) FINANCE CHARGE	(=) New Balance
PURCHASES	\$12,354.37	\$14,500.00	\$6,300.00	\$104.59	\$20,658.96
ADVANCES	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
TOTAL	\$12,354.37	\$14,500.00	\$6,300.00	\$104.59	\$20,658.96

Days This Billing Period: 30

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$0.00	0.03192%(D)	11.650%	11.650%
Offer 4	\$8,842.97	0.01890%(D)	6.900%	6.900%
Offer 6	\$2,385.59	0.01890%(D)	6.900%	6.900%
Offer 7	\$7,217.79	0.01890%(D)	6.900%	6.900%
ADVANCES				
Standard Adv	\$0.00	0.05477%(D)	19.990%	19.990%

SEND PAYMENTS TO:

938

PLEASE REFER TO THE REVERSE SIDE OF THE ORIGINAL STATEMENT FOR PAYMENT INFORMATION.

Make check or money order payable in U.S. dollars on a U.S. bank to Citi Cards. Include account number on check or money order. No cash please.

03/05/03 \$21413.67 \$1018.98 SITE:KC-CL TM:CO-6375 ACID:KCB1083  
 PMT DUE DATE NEW BALANCE MIN AMT DUE 06/06/03 22:54:54:

NICHOLAS R AREND  
 14109 EXCELSIOR BLVD  
 MINNETONKA  
 55345-4927000

MN

CITI CARDS  
 P.O. BOX 6406  
 THE LAKES, NV  
 88901-6406

## Citi® Platinum Select® Card

For Customer Service, call or write  
 1-800-950-5114

Account Number  
 5424 1801 7769 5829

Payment must be received by 1:00 pm local time on 03/05/2003

To report billing errors, write  
 to this address; calling will  
 not preserve your rights.

BOX 6000  
 THE LAKES, NV  
 89163-6000

Statement/Closing Date 02/10/2003	Total Credit Line \$21240	Available Credit Line \$0	Cash Advance Limit \$3490	Available Cash Limit \$0	New Balance \$21413.67
		Amount Over Credit Line \$173.67 +	Past Due \$399.31 +	Purch/Adv Minimum Due \$446.00 =	Minimum Amount Due \$1018.98

Sale Date	Post Date	Reference Number	Activity Since Last Statement	Amount
	1/12	M9784570	<b>Payments, Credits &amp; Adjustments</b>	
			CREDIT FINANCE CHARGES	-30.69
			72 0000 00	0000000000
	2/10		<b>Standard Purch</b>	
			LATE FEE - JAN PAYMENT PAST DUE	35.00
			66 0000	0000000000
1/20	1/20	*B4N2LK0	<b>Standard Adv</b>	
			TCF CUB MINNETONKA 995 MINNETONKA MN	600.00
			60 A6010US 1117	75411173021
	2/10		ADVANCES*FINANCE CHARGE*FOR TRANSACTIONS	18.00
			86 0000	0000000000
	2/10		ADVANCES*FINANCE CHARGE*PERIODIC RATE	7.27
			84 0000	0000000000
	2/10		<b>Balance Transfer - Charged To Offer 4</b>	
			PURCHASES*FINANCE CHARGE*PERIODIC RATE	36.85
			84 0000	0000000000
	2/10		<b>Balance Transfer - Charged To Offer 6</b>	
			PURCHASES*FINANCE CHARGE*PERIODIC RATE	39.51
			84 0000	0000000000
	2/10		<b>Balance Transfer - Charged To Offer 7</b>	
			PURCHASES*FINANCE CHARGE*PERIODIC RATE	48.77
			84 0000	0000000000

The Annual Percentage Rate on your account may increase due to one of the following reasons stated in your Card Agreement with us: if you fail to make a payment to us or any other creditor when due, you exceed your credit line or you make a payment to us that is not honored by your bank.

Each Cash Advance is subject to a one-time transaction fee. This fee will cause your Annual Percentage Rate to exceed the nominal Annual Percentage Rate listed on this statement.

SEND PAYMENTS TO:

PLEASE REFER TO THE REVERSE SIDE OF THE ORIGINAL STATEMENT FOR PAYMENT INFORMATION.

Make check or money order payable in U.S. dollars on a U.S. bank to Citi Cards. Include account number on check or money order. No cash please.

NICHOLAS R AREND

Sale Date	Post Date	Reference Number	Activity Since Last Statement	Amount
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Account Summary	Previous Balance	(+) Purchases & Advances	(-) Payments & Credits	(+) FINANCE CHARGE	(=) New Balance
PURCHASES	\$20,658.96	\$35.00	\$30.69	\$125.13	\$20,788.40
ADVANCES	\$0.00	\$600.00	\$0.00	\$25.27	\$625.27
TOTAL	\$20,658.96	\$635.00	\$30.69	\$150.40	\$21,413.67

Days This Billing Period: 32

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$0.00	0.03192%(D)	11.650%	11.650%
Offer 4	\$6,093.58	0.01890%(D)	6.900%	6.900%
Offer 6	\$6,532.65	0.01890%(D)	6.900%	6.900%
Offer 7	\$8,064.52	0.01890%(D)	6.900%	6.900%
ADVANCES				
Standard Adv	\$414.88	0.05477%(D)	19.990%	50.539%
SEND PAYMENTS TO:				939

PLEASE REFER TO THE REVERSE SIDE OF THE ORIGINAL STATEMENT FOR PAYMENT INFORMATION.

Make check or money order payable in U.S. dollars on a U.S. bank to CIB Cards. Include account number on check or money order. No cash please.

## CITIBANK CARD AGREEMENT

This Agreement and the card carrier are your Citibank Card Agreement. The card carrier contains important account information, including the annual percentage rate and the amount of any membership fee. Please read and keep both the card carrier and this Agreement for your records. This Agreement is binding on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of your account.

To simplify this Agreement for you, the following definitions will apply. The words *you*, *your*, and *yours* mean all persons responsible for complying with this Agreement, including the person who applied to open the account and the person to whom we address billing statements. The word *card* means one or more cards or other access devices, such as account numbers, that we have issued to permit you to obtain credit under this Agreement. The words *we*, *us*, and *our* mean Citibank (South Dakota), N.A. The words *authorized user* mean any person to whom you give permission to use your account. The words *Citibank checks* mean one or more checks that we may provide for you to obtain a cash advance. The words *Balance Transfer checks* mean one or more checks that we may provide for you to obtain a balance transfer. Balance transfers will be treated as purchases for all purposes, except as otherwise described in this Agreement.

### Using Your Account and Your Credit Line:

The card must be signed to be used. Whether you sign the card or not, you are fully responsible for complying with all the terms of this Agreement, including the obligation to pay us for all balances due on your account as specified in this Agreement. Your card must only be used for lawful transactions.

Your initial credit line appears on the card carrier. A portion of your credit line, called the cash advance limit, is available for cash advances. At our discretion and at any time, we may change your credit line or cash advance limit. We will notify you of any new line or limit either by sending you a notice or through your billing statement. A change may take effect before you receive notification from us. You may request a change to your credit line or cash advance limit by contacting Customer Service by telephone or mail.

The full amount of your credit line is available to buy or lease goods or services wherever the card is honored. Your cash advance limit is available for cash through any bank or automated teller machine that accepts the card or by using Citibank checks. The total amount charged on your account, including purchases, balance transfers, cash advances, finance charges, fees, or other charges, must always remain below your credit line. However if that total amount exceeds your credit line you must still pay us. We may approve transactions that cause the balance to exceed your credit line without waiving any of our rights under this Agreement.

### Additional Cards:

You may request additional cards on your account for yourself or others and you may permit an authorized user to have access to the card or account number. However, if you do, you must pay us for all charges made by those persons, including charges for which you may not have intended to be responsible. You must notify us to revoke an authorized user's permission to use your account. If you do so, we may close the account and issue a new card or cards with a different account number. You are responsible for the use of each card issued on your account according to the terms of this Agreement.

### Membership Fee:

The card carrier indicates whether your account is subject to a membership fee. If it is, the fee is added to the standard purchase balance and is non-refundable unless you notify us to cancel your account within 30 days from the mailing or delivery date of the billing statement on which the fee is billed.

### Billing:

Your billing statement shows the balance, any finance charges, fees, the minimum payment, and the payment due date. It also shows your current credit line and cash advance limit; an itemized list of current charges, Citibank checks, payments and credits; a summary of the purchase and cash advance activity, including the finance charges; a rate summary; and other important information. If we deem your account uncollectible or if we institute delinquency collection proceedings by sending it to an outside collection agency or attorney for collection, we may, in our sole discretion, stop sending you billing statements.

You must notify us of a change in your address by contacting Customer Service by telephone or mail. We will mail or deliver the billing statement to only one address.

### How We Determine the Balance:

The total outstanding balance (the amount you owe us) appears as the "New Balance" on the billing statement. To determine the New Balance, we begin with the outstanding balance on your account at the beginning of each billing period, called the "Previous Balance" on the billing statement. We add any purchases or cash advances and subtract any credits and payments credited as of that billing period. We then add the appropriate finance charges and fees and make other applicable adjustments.

### Annual Percentage Rate for Purchases:

Your annual percentage rate for purchases and the corresponding daily periodic rate appear on the card carrier. A daily periodic rate is the applicable annual percentage rate divided by 365. Whether or not the annual percentage rate for purchases is based on the U.S. Prime Rate plus a margin is indicated on the card carrier. Please see

EXHIBIT

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the section entitled "Variable Annual Percentage Rates for Purchases and Cash Advances" for details relating to how this rate may change.

#### **Annual Percentage Rate for Cash Advances:**

Your **ANNUAL PERCENTAGE RATE** for cash advances is 19.99%, which corresponds to a daily periodic rate of 0.0548%. The daily periodic rate is the cash advance annual percentage rate divided by 365. Please see the section entitled "Variable Annual Percentage Rates for Purchases and Cash Advances" for details relating to how this rate may change, including if you default under any Citibank Card Agreement.

#### **Variable Annual Percentage Rates for Purchases and Cash Advances:**

If any annual percentage rate for purchases is based on the U.S. Prime Rate plus a margin, we will calculate the rate by adding the margin that appears on the card carrier to the Prime Rate published in *The Wall Street Journal* on the last business day of each month. If more than one Prime Rate is published, we may choose the highest rate. If *The Wall Street Journal* ceases publication or to publish the Prime Rate, we may use the Prime Rate published in any other newspaper of general circulation, or we may substitute a similar reference rate at our sole discretion. Any increase or decrease in a variable annual percentage rate due to a change in the Prime Rate takes effect on the first day of the billing period that begins in the month directly following the month in which we determine the Prime Rate. Each time the annual percentage rate changes, we will apply it to any existing balances, subject to any promotional rate that may apply.

The annual percentage rate for purchases and cash advances may also vary if you default under any Citibank Card Agreement because you fail to make a payment to us or any other creditor when due, you exceed your credit line, or you make a payment to us that is not honored by your bank. In such circumstances, we may increase the **ANNUAL PERCENTAGE RATE** (including any promotional rate) on all balances to a default rate of up to 24.99%. Factors considered in determining this default rate may include the length of time the account has been open, the existence, seriousness, and timing of Citibank Card Agreement defaults, and other indications of account usage and performance. The increase in the variable annual percentage rate as described in this paragraph takes effect as of the first day of the billing period in which you default. Your account may again become eligible for a lower annual percentage rate on new purchases, new cash advances, or both after you have met the terms of all Citibank Card Agreements for six consecutive months. Your existing balances will remain subject to the default rate until they are paid in full.

The annual percentage rate in effect and any subsequent changes to it will appear on the billing statement. An increase in the variable annual percentage rate means you will pay a higher finance charge and perhaps a higher minimum payment.

#### **Promotional Rate Offers:**

At our discretion, we may offer you a promotional annual percentage rate for all or a part of any balances. The period of time for which the promotional rate applies may be limited. Any promotional rate, the corresponding periodic rates, and the period of time during which it is in effect will appear on the card carrier. We may also offer you a promotional annual percentage rate to encourage specific transactions, such as transferring balances from accounts you have with others. Any promotional rate offer will be subject to the terms of the offer and this Agreement.

#### **Finance Charges:**

Finance charges will begin to accrue from the date of the transaction for purchases and continue to accrue until payment in full is credited to your account. However, if you paid the total New Balance, if any, listed on the last billing statement by the payment due date on that statement you will have until the payment due date on your current statement to pay your total New Balance to avoid imposition of additional finance charges on purchases. If you have accepted certain balance transfer offers for which you may be eligible, you may not be able to avoid additional finance charges on purchases, as described in your balance transfer offer. For cash advances and balance transfers, finance charges will begin to accrue from the date of the transaction and continue to accrue until payment in full is credited to your account.

We will calculate finance charges as follows:

- We figure a portion of the finance charge on your account by multiplying the daily balance on each feature (e.g., standard purchases or cash advances) by the applicable daily periodic rate and separately adding together any such finance charges for each feature for each day in the billing period.
- For finance charge calculation purposes, the billing period begins on the day after the Statement/Closing Date of the previous billing period and includes the Statement/Closing Date of the current billing period. The number of days in the billing period may vary.
- To get the daily balance, we take the beginning balance for each feature every day (which may include unpaid finance charges from previous billing periods), add any new transactions, fees, and any finance charge on the previous day's balance, subtract any credits or payments credited as of that day, and make other adjustments. Unless we elect to use a later date, we add a new purchase to the appropriate purchase balance as of the date of the purchase and a new cash advance to the cash advance balance on the date of the advance. A credit balance is treated as a balance of zero.
- The Balances Subject to Finance Charge on the billing statement are the averages of the respective daily balances during the billing period. If you multiply this figure for each feature by the number of days in the billing period and by the applicable daily periodic rate, the result will be the periodic rate finance charges assessed for



that feature, except for minor variations caused by rounding. This method of calculating the balance subject to finance charge and the periodic rate finance charges results in daily compounding of finance charges.

#### **Transaction Fee for Balance Transfers:**

You have obtained a balance transfer if you transfer a balance from others by means other than a Citibank check, or you obtain funds through a Balance Transfer check. To each balance transfer we add an additional **FINANCE CHARGE** of 3.0% of the balance transfer, but not less than \$5 or more than \$50. This fee will be added to the purchase balance with the balance transfer. The balance transfer transaction fee may cause the annual percentage rate on the billing statement on which the balance transfer first appears to exceed the nominal annual percentage rate.

#### **Transaction Fee for Cash Advances:**

You have obtained a cash advance if you obtain funds from an automated teller machine (ATM), through a Citibank check, through home banking, or through a financial institution; make a wire transfer; acquire a money order, traveler's check, lottery ticket, betting or casino chip, or similar item; or engage in another similar transaction. For each cash advance, we add an additional **FINANCE CHARGE** of 3.0% of the advance, but not less than \$5. This fee will be added to the cash advance balance. (The amount of the cash advance may include a surcharge that the ATM owner imposes.) The cash advance transaction fee may cause the annual percentage rate on the billing statement on which the cash advance first appears to exceed the nominal annual percentage rate.

#### **Minimum Finance Charge:**

If finance charges based on periodic rates are being added to your account, but the total of such finance charges for purchases and cash advances is less than \$.50, we assess a minimum **FINANCE CHARGE**, based on periodic rates, of \$.50. We add the amount to the feature that is being assessed a finance charge. If more than one feature is assessed a finance charge, we may add the minimum finance charge to any such feature at our discretion.

#### **Credit Balance:**

You may not maintain a credit balance on your account in excess of your assigned credit line. We will return to you any credit amount over \$1.00 if the amount has been on your account longer than three months. You may request a refund of a credit balance at any time. We may reduce the amount of any credit balance by the amount of new charges billed to your account.

#### **Security Interest for Secured Accounts:**

The card carrier indicates if your account is a secured account. If it is, you have given us a security interest in a Citibank Certificate

of Deposit to secure repayment of your account. If you withdraw your funds from the Certificate of Deposit, we will close your card account.

#### **Transactions Made in Foreign Currencies:**

If a transaction is made in a foreign currency, we and MasterCard International or Visa International, depending on which card is used, will convert the transaction into a U.S. dollar amount. MasterCard and Visa will act in accordance with their operating regulations or conversion procedures in effect at the time the transaction is processed. Currently, their regulations and procedures provide that the currency conversion rate they use is either (1) a wholesale market rate or (2) a government-mandated rate in effect one day prior to the processing date. MasterCard and Visa increase this conversion rate by one percent and keep this increase. We increase the conversion rate provided to us by MasterCard or Visa by two percent and keep this increase. The currency conversion rate calculated in this manner that is in effect on the processing date may differ from the rate in effect on the transaction date or the posting date.

#### **Minimum Amount Due:**

Each month you must pay a minimum amount that is the total of two figures. The first is any previous amount that is past due plus any amount in excess of your credit line. The second is the greater of the amount of your billed finance charges or one of the following:

- The New Balance on the billing statement if it is less than \$20, or
- \$20, if the New Balance is at least \$20 and not greater than \$960, or
- if the New Balance exceeds \$960, 1/48 of the New Balance (rounded down to the nearest dollar).

In calculating the minimum amount due, we may subtract from the New Balance certain fees added to your account during the billing period.

#### **Payments:**

You must pay at least the minimum amount by the payment due date, and you may pay more at any time without a penalty. The New Balance shown on your billing statement may include amounts subject to different periodic rates. We will allocate your payment and credits to pay off balances at low periodic rates before paying off balances at higher periodic rates. The sooner you pay the New Balance, the less you will pay in finance charges. We may also allow you to skip a payment. If we do, we will notify you. If you choose to skip a payment when offered, we will continue to assess finance charges.

Instructions for making payments are on your billing statement. In order to be credited as of a particular day, your payment must be received in the form specified, and by the hour specified, in those instructions. Do not send cash payments. We can accept late or par-

tial payments, as well as payments that reflect "paid in full" or other restrictive endorsements, without losing any of our rights under this Agreement. You agree to pay us in U.S. dollars drawn on funds on deposit in the United States using a payment check, similar instrument, or automatic debit that will be processed and honored by your bank. We reserve the right to accept payments made in foreign currency and instruments drawn on funds on deposit outside the United States. If we do, we will select the effective currency conversion rate at our discretion and credit your account in U.S. dollars after deducting any fees or costs incurred in connection with processing your payment. If such fees or costs are not fully deducted at the time your account is credited for a payment, we will bill you separately for them.

#### **Over-the-Credit-Line Fee:**

We will add a \$29 fee to the standard purchase balance for each billing period that the New Balance exceeds your credit line. We may add this \$29 fee even if we authorize the transaction that causes the New Balance to exceed your credit line.

#### **Late Fee:**

We will add a late fee to the standard purchase balance for each billing period you fail to make the minimum payment by its due date. This late fee will be: \$15 on balances up to \$100, \$25 on balances of \$100 up to \$1000, and \$35 on balances of \$1000 and over.

#### **Returned Payment Fee:**

We will add a \$29 fee to the standard purchase balance when a payment check or similar instrument is not honored, when we must return it because it cannot be processed, or when an automatic debit is returned unpaid. At our option, we will assess this fee the first time your check or payment is not honored, even if it is honored upon resubmission.

#### **Citibank Checks:**

Citibank checks may be used to purchase goods and services or to obtain cash up to the amount of your available cash advance limit unless that amount will cause the balance to exceed your credit line. We will treat Citibank checks as a cash advance and charge them against your cash advance limit. Each Citibank check must be in the form we have issued and must be used according to any instructions we give you. Citibank checks may be used only by the person whose name is printed on them. Citibank checks may not be used to pay any amount owed to us under this or any other Citibank Card Agreement. We will not certify any Citibank checks, nor will we return paid Citibank checks.

#### **Balance Transfer Checks:**

Balance Transfer checks may be used to transfer balances from others or to obtain funds up to the amount of your available credit line. Each Balance Transfer check must be in the form we have

issued and must be used according to any instructions we give you. Balance Transfer checks may not be used to pay any amount owed to us under this or any other Citibank Card Agreement. We will not certify any Balance Transfer checks, nor will we return paid Balance Transfer checks.

#### **Returned Citibank Check Fee:**

We will add a \$29 fee to the cash advance balance if we decline to honor a Citibank check. We may decline to honor such checks if, for example, the amount of the check would cause the balance to exceed your cash advance limit or credit line, if you default, if you did not comply with our instructions regarding the check, if your account has been closed, or if the card has expired.

#### **Stop Payment Fee:**

We will add a \$29 fee to the cash advance balance when payment of a Citibank check is stopped at your request. You may stop payment on Citibank checks by notifying us in writing at P.O. Box 6500, Sioux Falls, South Dakota 57117, or by calling us at the telephone number listed on the billing statement, if you call, you must confirm the call in writing within 14 days. A written stop payment order will remain in effect for six months unless renewed in writing.

Once a charge is made through the use of the card or account number we cannot "stop payment" on the charge. If there is a dispute involving a charge on your account, please refer to the section entitled "What To Do if There's An Error In Your Bill".

#### **Lost or Stolen Cards, Account Numbers, or Citibank and Balance Transfer Checks:**

If any card, account number, or check is lost or stolen or if you think someone used or may use them without your permission, notify us at once by calling the telephone number shown on the billing statement or the number obtained by calling toll-free or local Directory Assistance. We may require you to provide certain information in writing to help us find out what happened, and to comply with such procedures as we may require in connection with our investigation. Don't use the card, account number, or any checks after we've been notified, even if they are found or returned. You may be liable for unauthorized use of the account, but not for more than \$50. You won't be liable for unauthorized purchases or cash advances made after we've been notified of the loss or the theft; however, you must identify for us the charges on the billing statement that were not made by you, or someone authorized by you, and from which you received no benefit.

#### **Default:**

You default under this Agreement if you fail to pay the minimum payment listed on each billing statement when due, fail to make a payment to any other creditor when due, file for bankruptcy, exceed your credit line, pay by a check or similar instrument that is not

honored or that we must return because it cannot be processed, pay by automatic debit that is returned unpaid, or default on any other Citibank Card Agreement. If you default, we may close your account and demand immediate payment of the full balance. If you have given us a security interest in a Certificate of Deposit, we may use the deposit amount to pay any amount you owe.

#### **Preauthorized Charges:**

If you default, if the card is lost or stolen, or we change your account or account number for any reason, we may suspend automatic charges on that account to third party vendors for insurance premiums or other goods or services. If preauthorized charges are suspended, you must contact the third party vendor to reinstate them. You are responsible for making direct payment for such charges until you reinstate automatic charges.

#### **Collection Costs:**

If we refer collection of your account to a lawyer who is not our salaried employee, you will be liable for any reasonable attorney's fees we incur, plus the costs and expenses of any legal action, to the extent permitted by law.

#### **Arbitration:**

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

#### **Agreement to Arbitrate:**

Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

#### **Claims Covered:**

• **What Claims are subject to arbitration?** All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect

arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

• **Whose Claims are subject to arbitration?** Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant or authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy.

• **What time frame applies to Claims subject to arbitration?** Claims arising in the past, present, or future, including Claims arising before the opening of your account, are subject to arbitration.

• **Broadest interpretation.** Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

• **What about Claims filed in Small Claims Court?** Claims filed in a small claims court are not subject to arbitration, so long as the matter remains in such court and advances only an individual (non-class, non-representative) Claim.

#### **How Arbitration Works:**

• **How does a party initiate arbitration?** The party filing an arbitration must choose one of the following three arbitration firms and follow its rules and procedures for initiating and pursuing an arbitration: American Arbitration Association, JAMS, and National Arbitration Forum. Any arbitration hearing that you attend will be held at a place chosen by the arbitration firm in the same city as the U.S. District Court closest to your then current billing address, or at some other place to which you and we agree in writing. You may obtain copies of the current rules of each of the three arbitration firms and forms and instructions for initiating an arbitration by contacting them as follows:

American Arbitration Association  
335 Madison Avenue, Floor 10  
New York, NY 10017-4605  
Web site: [www.adr.org](http://www.adr.org)

JAMS  
1920 Main Street, Suite 300  
Irvine, CA 92610  
Web site: [www.jamsadr.com](http://www.jamsadr.com)

National Arbitration Forum  
P.O. Box 50191  
Minneapolis, MN 55405  
Web site: [www.arbitration-forum.com](http://www.arbitration-forum.com)

At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the resolution of Claims pending arbitration, even if such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. Even if a party fails to exercise these rights at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims.

• **What procedures and law are applicable in arbitration?** A single, neutral arbitrator will resolve Claims. The arbitrator will be either a lawyer with at least ten years experience or a retired or former judge, selected in accordance with the rules of the arbitration firm. The arbitration will follow procedures and rules of the arbitration firm in effect on the date the arbitration is filed unless those procedures and rules are inconsistent with this Agreement, in which case this Agreement will prevail. Those procedures and rules may limit the discovery available to you or us. The arbitrator will take reasonable steps to protect customer account information and other confidential information if requested to do so by you or us. The arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations, will honor claims of privilege recognized at law, and will have the power to award to a party any damages or other relief provided for under applicable law. You or we may choose to have a hearing and be represented by counsel. The arbitrator will make any award in writing and, if requested by you or us, will provide a brief statement of the reasons for the award. An award in arbitration shall determine the rights and obligations between the named parties only, and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute.

• **Who pays?** Whoever files the arbitration pays the initial filing fee. If we file, we pay; if you file, you pay, unless you get a fee waiver under the applicable rules of the arbitration firm. If you have paid the initial filing fee and you prevail, we will reimburse you for that fee. If there is a hearing, we will pay any fees of the arbitrator and arbitration firm for the first day of that hearing. All other fees will be allocated as provided by the rules of the arbitration firm and applicable law. However, we will advance or reimburse your fees if the arbitration firm or arbitrator determines there is good reason for requiring us to do so, or if you ask us and we determine there is good reason for doing so. Each party will bear the expense of that party's attorneys, experts, and witnesses, and other expenses, regardless of which party prevails, but a party may recover any or all expenses from another party if the arbitrator, applying applicable law, so determines.

• **Who can be a party?** Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney

general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court. Claims, including assigned Claims, of two or more persons may not be joined or consolidated in the same arbitration. However, applicants, co-applicants, authorized users on a single account and/or related accounts, or corporate affiliates are here considered as one person.

• **When is an arbitration award final?** The arbitrator's award is final and binding on the parties unless a party appeals it in writing to the arbitration firm within fifteen days of notice of the award. The appeal must request a new arbitration before a panel of three neutral arbitrators designated by the same arbitration firm. The panel will consider all factual and legal issues anew, follow the same rules that apply to a proceeding using a single arbitrator, and make decisions based on the vote of the majority. Costs will be allocated in the same way they are allocated for arbitration before a single arbitrator. An award by a panel is final and binding on the parties after fifteen days has passed. A final and binding award is subject to judicial review and enforcement as provided by the FAA or other applicable law.

#### **Survival and Severability of Terms:**

• This arbitration provision shall survive: (i) termination or changes in the Agreement, the account, and the relationship between you and us concerning the account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity. If any portion of this arbitration provision is deemed invalid or unenforceable, the remaining portions shall nevertheless remain in force. Any different agreement regarding arbitration must be agreed to in writing.

#### **Credit Reporting:**

We may report your performance under this Agreement to credit reporting agencies, including your failure to make minimum payments on time. If you request additional cards on your account for others, you understand that we may report account information in your name as well as in the names of those other people. We may also obtain follow-up credit reports on you (for example, when we review your account for a credit line increase). If you wish to know the names of the agencies we have contacted, write us at the address listed on the billing statement. We will try to notify you by telephone or by mail of any legal process served on us in order to give you an opportunity to object to it, unless the law prohibits the notice.

If you think we reported erroneous information to a credit reporting agency, write us at the Customer Service address listed on the front of the billing statement. We will promptly investigate the matter and if our investigation shows you are right, we will contact each credit reporting agency to whom we reported and will request they correct the report. If we disagree with you after our investigation, we will tell you in writing or by telephone and instruct you how to submit a

statement of your position to those agencies. Your statement will become a part of your credit record with them.

**Telephone Monitoring and Recording:**

From time to time we may monitor and record your telephone calls regarding your account with us to assure the quality of our service.

**Closing Your Account:**

You may close your account at any time by notifying us in writing. However, you remain responsible to pay the balance according to the terms of this Agreement. We may close your account or suspend your account privileges at any time for any reason without prior notice. We may also reissue a different card, account number, or different checks at any time. You must return the card or the checks to us upon request.

**Refusal of the Card:**

We are not responsible if a transaction on your account is not approved, either by us or by a third party, even if you have sufficient credit available. We may limit the number of transactions that may be approved in one day. If we detect unusual or suspicious activity on your account, we may temporarily suspend your credit privileges until we can verify the activity.

**Changing this Agreement:**

We can change this Agreement, including all fees and the annual percentage rate, at any time. We can also add or delete provisions relating to your account and to the nature, extent, and enforcement of the rights and obligations you or we may have relating to this Agreement. These changes are binding on you. However, if the change will cause a fee, rate or minimum payment to increase, we will mail you written notice at least 15 days before the beginning of the billing period in which the change becomes effective. If you do not agree to the change, you must notify us in writing within 25 days after the effective date of the change and pay us the balance, either at once or under the terms of the unchanged Agreement. Unless we notify you otherwise, use of the card after the effective date of the change shall be deemed acceptance of the new terms, even if the 25 days have not expired.

**Enforcing this Agreement:**

We can delay in enforcing or fail to enforce any of our rights under this Agreement without losing them.

**Assignment:**

We reserve the right to assign any or all of our rights and obligations under this Agreement to a third party.

**Applicable Law:**

The terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where we are located.

**For Further Information:**

Call us at the telephone number shown on the front of the billing statement. You can also call toll-free or local Directory Assistance to get our telephone number.



Ken Stork  
President & CEO

Citibank (South Dakota), N.A.  
P.O. Box 6000  
Sioux Falls, SD 57117

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### **What To Do If There's An Error in Your Bill.**

#### **Your Billing Rights. Keep This Notice For Future Use.**

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

#### **Notify Us In Case of Errors or Questions About Your Bill.**

If you think your billing statement is wrong, or if you need more information about a transaction on your billing statement, write to us (on a separate sheet) at the address provided in the Billing Rights Summary portion on the back of your billing statement. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first billing statement on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.
- Please sign your letter.

If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment you must tell us at least three business days before the automatic payment is scheduled to occur.

#### **Your Rights and Our Responsibilities After We Receive Your Written Notice.**

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe your billing statement was correct. After we receive your letter, we cannot try to collect any amount you question, or report your account as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your credit line. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your balance that are not in question.

If we find that we made a mistake on your billing statement, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within 10 days telling us that you still refuse to

pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name and address of anyone to whom we reported your account information. We must tell anyone we report you to that the matter has been settled between us when it is finally settled.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your billing statement was correct.

#### **Special Rule for Credit Card Purchases.**

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

- You must have made the purchase in your home state or, if not within your home state, within 100 miles of your current address; and
- The purchase price must have been more than \$50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

8349170H 09/01 Pri 09/01

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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Re: Nicholas Richard Arend,

Bky Case No. 03-42833

Debtor.

Chapter 7

Citibank (South Dakota), N.A.,

Plaintiff,

v.

Adv Case No. 03-4194

Nicholas Richard Arend,

Defendant.

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MEMORANDUM

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The records of the Bankruptcy Court reflect that this Adversary Proceeding was commenced on or about August 6, 2003.

Defendant served a pro se Answer on or about August 23, 2003.

On or about September 22, 2003, this Court issued sua sponte a Scheduling Order and Order for Trial, pursuant to which, among other things, all discovery was to have been concluded by November 21, 2003. Trial was scheduled for January 20, 2004.

On October 7, 2003, Plaintiff served detailed written discovery. Defendant did not respond. Plaintiff could not conduct a meaningful deposition of the Defendant without such written responses, and thus brought its first Motion to Compel.

In that first Motion, Plaintiff sought an order compelling a response, and also providing that in the absence of such response and upon the filing of affidavits attesting to such further nonresponse, as well as to the merits and the amounts due, that default judgment be entered. Additionally, Plaintiff sought relief regarding the discovery and other deadlines in the original Scheduling Order.

That first Motion resulted in this Court's Order of December 2, 2003, pursuant to the terms of which the Defendant was required to serve responses to written discovery no later than 15 days after the date of the Order. The Court also issued an Amended Scheduling Order, which set the close of discovery at January 15, 2004, and set a trial for March, 2004.

On December 12, 2003, Defendant faxed his responses to the office of the undersigned. A copy of those responses is attached to Plaintiff's counsel's supporting Affidavit as Exhibit A. The fax was followed by mailed service.

Although the responses were unresponsive in various respects, Plaintiff's counsel went forward with the discovery process to bring this matter to a conclusion.

Specifically, Plaintiff served a Notice of Deposition (a copy of which is attached to Plaintiff's counsel's supporting Affidavit as Exhibit B) on December 23, 2003. To keep within the requirements of the Amended Scheduling Order, the Deposition was scheduled to take place at Plaintiff's counsel's offices on the morning of January 7, 2004.

The Defendant did not show for his deposition on January 7, 2004. Plaintiff's counsel waited one half hour for the Defendant to appear, and then made a record with the Court Reporter of the Defendant's nonappearance. Neither Plaintiff nor its counsel have received any further communications from the Defendant.

Plaintiff incurred approximately \$90 of court reporter fees in connection with Defendant's failure to appear at his own deposition. Plaintiff's counsel's professional time, including preparation for the Deposition (including exhibits), as well as the bringing of this motion, is estimated to total approximately three and one half hours. Plaintiff's counsel's hourly rate range from \$200 to \$240 per hour.

Rule 37(d) of the Federal Rules of Civil Procedure ("FRCP") provides in pertinent part as follows:

**"(b) Failure of Party to Attend at Own Deposition....**

**...(2) Sanctions by Court in Which Action is Pending.** If a party...fails (1) to appear before the officer who is to take the deposition, after being served with proper notice,...the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among other things it may take any action authorized under subparagraphs (A), (B) and (C) of subdivision (b)(2) of this rule....In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorneys fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

FRCP Rule 37(d).

Rule 37(b)(2)(C) of FRCP provides in pertinent part as follows:

**"(b) Failure to Comply With Order.**

**...(2) Sanctions by Court in Which Action is Pending.** If a party...fails to obey an order to provide or permit discovery,...the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:  
...(C) An order...rendering a judgment by default against the disobedient party...."

FRCP Rule 37(b)(2)(C).

Plaintiff has now brought a Motion seeking a default judgement, as provided for above. An Affidavit by Plaintiff, attesting to the underlying facts of the case and the amount due,



accompanies this motion. The immediate granting of judgment is appropriate here. This is the Defendant's second failure to comply with discovery; enough is enough.

In the alternative to the forgoing requested relief, Plaintiff requests an order compelling the Defendant to reimburse Plaintiff for its costs and fees caused by Defendant's failure to attend his own deposition, and further ordering Defendant to appear at his deposition to be rescheduled by Plaintiff's attorney, extending the deadlines in the Court's already once-amended Scheduling Order<sup>1</sup>, and further providing for the immediate entry of default judgment if Defendant fails to attend the rescheduled deposition.

In the event any relief is granted, the above rule appears to mandate an award of fees and costs to Plaintiff.

Respectfully submitted,

STEIN & MOORE, P.A.

Date: January 7, 2004

By /e/ Peter B. Stein  
Peter B. Stein #104917  
Attorneys for Plaintiff  
The First National Bank Building  
332 Minnesota Street, Suite W-1650  
St. Paul, MN 55101  
(651) 224-9683

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<sup>1</sup> Specifically, and only in the event that default judgment is not immediately awarded, Plaintiff seeks a suspension of the discovery deadline pending further developments. If immediate default judgment is not awarded, and if Defendant fails to comply with the order compelling attendance at his rescheduled deposition, Plaintiff will receive default judgment and the matter of scheduling will be moot. But if Defendant does appear for any such deposition, all of the deadlines and dates in the Amended Scheduling Order should be further adjusted accordingly

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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Re: Nicholas Richard Arend,

Bky Case No. 03-42833

Debtor.

Chapter 7

Citibank (South Dakota), N.A.,

**UNSWORN DECLARATION  
OF SERVICE**

Plaintiff,

v.

Adv Case No. 03-4194

Nicholas Richard Arend,

Defendant.

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Pam Stevens, employed by Stein & Moore, P.A., attorneys licensed to practice law in this Court, with an office address of the First National Bank Building, 332 Minnesota Street, Suite W-1650, St. Paul, Minnesota 55101, declares that on January 7, 2004, I served:

*Notice of Motion and Motion  
Affidavit of Peter B. Stein  
Affidavit of the Merits and Amount Due  
Memorandum  
Proposed Order*

upon the Defendant named below by mailing to him by first class mail a copy thereof by enclosing same in an envelope with postage prepaid and depositing same in a mailbox in St. Paul, Minnesota addressed to him as follows:

Nicholas Richard Arend, Pro Se  
14109 Excelsior Blvd.  
Minnetonka, MN 55345

and I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: January 7, 2004

By: /e/Pam Stevens

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

Re: Nicholas Richard Arend,

Bky Case No. 03-42833

Debtor.

Chapter 7

Citibank (South Dakota), N.A.,

Plaintiff,

v.

Adv Case No. 03-4194

Nicholas Richard Arend,

Defendant.

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ORDER

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At Minneapolis, Minnesota.

Plaintiff's Motion For Default Judgment As Sanction For Defendant's Failure To Attend Deposition And For Alternative Relief, came on before the undersigned Judge of Bankruptcy Court. Appearances, if any, were as noted in the record.

Upon all the files and proceedings herein, the Court finds as follows:

1. This Adversary Proceeding was commenced on or about August 6, 2003.
2. Defendant served a pro se Answer on or about August 23, 2003.
3. On or about September 22, 2003, this Court issued sua sponte a Scheduling Order and Order for Trial, pursuant to which, among other things, all discovery was to have been concluded by November 21, 2003. Trial was scheduled for January 20, 2004.
4. On October 7, 2003, Plaintiff served detailed written discovery. Defendant did not respond. Plaintiff contended that it could not conduct a meaningful deposition of the Defendant without such written responses, and thus brought a Motion to Compel.
5. In that first Motion, Plaintiff sought an order compelling a response, and also providing that in the absence of such response and upon the filing of affidavits attesting to such further nonresponse, as well as to the merits and the amounts due, that default judgment be entered. Additionally, Plaintiff sought relief regarding the discovery and other deadlines in the original Scheduling Order.

6. That first Motion resulted in this Court's Order of December 2, 2003, pursuant to the terms of which the Defendant was required to serve responses to written discovery no later than 15 days after the date of the Order. The Court also issued an Amended Scheduling Order, which set the close of discovery at January 15, 2004, and set a trial for March, 2004.

7. On December 12, 2003, Defendant faxed his responses to written discovery to the office of the counsel for Plaintiff. The fax was followed by mailed service.

8. Although Plaintiff's counsel asserts that the responses were unresponsive in various respects, Plaintiff's counsel determined to go forward with the discovery process to bring this matter to a conclusion.

9. Specifically, Plaintiff served a Notice of Deposition on December 23, 2003. The Deposition was scheduled to take place at Plaintiff's counsel's offices on the morning of January 7, 2004.

10. The Defendant did not appear for his deposition on January 7, 2004. Plaintiff's counsel waited one half hour for the Defendant to appear, and then made a record with the Court Reporter of the Defendant's nonappearance. Neither Plaintiff nor its counsel have received any further communications from the Defendant.

11. Plaintiff incurred approximately \$90 of court reporter fees in connection with Defendant's failure to appear at his own deposition. Plaintiff's counsel's professional time, including preparation for the Deposition (including exhibits), as well as the bringing of this motion, is estimated to total approximately three and one half hours. Plaintiff's counsel's hourly rate range from \$200 to \$240 per hour. Plaintiff's ordinary legal fees in an matter of this type are no less than \$600.00

Rule 37(d) of the Federal Rules of Civil Procedure ("FRCP") provides in pertinent part as follows:

**"(b) Failure of Party to Attend at Own Deposition....**

**...(2) Sanctions by Court in Which Action is Pending.** If a party...fails (1) to appear before the officer who is to take the deposition, after being served with proper notice,...the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among other things it may take any action authorized under subparagraphs (A), (B) and (C) of subdivision (b)(2) of this rule....In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorneys fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

FRCP Rule 37(d).

Rule 37(b)(2)(C) of FRCP provides in pertinent part as follows:

**"(b) Failure to Comply With Order.**

**...(2) Sanctions by Court in Which Action is Pending.** If a party...fails to obey an order to provide or permit discovery,...the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

...(C) An order...rendering a judgment by default against the disobedient party...."

FRCP Rule 37(b)(2)(C).

The immediate granting of default judgment against Defendant is appropriate under the circumstances of this case. This is the Defendant's second failure to comply with discovery, and this is Plaintiff's second motion with regard to such failures.

Plaintiff has filed an Affidavit as to the underlying facts of the case, and as to the amount due.

IT IS ACCORDINGLY ORDERED AS FOLLOWS:

The Clerk shall enter judgment, nondischargeable under 11 U.S.C. §523(a)(2)(A), in favor of Plaintiff and against the Defendant in the amount of \$8,800.00, together with attorney's fees in the amount of \$1320.00 (\$600 + 720), plus costs of \$240.00 (\$150 + \$90), in all totaling \$10,360.00.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Nancy C. Dreher  
Judge of Bankruptcy Court